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THE GROWTH OF CUSTOM INTO LAW.

The importance of custom as an element of law is frequently overestimated. An eminent attorney and legal philosopher once said: " * * * the conclusion, at which I arrive, erects present existing customs as *the* standard of law." This well voices the opinion of an important group of legal authorities, an opinion which must appear to many to be both extreme and untenable. The purpose of this paper is to assign to custom a proper position as an element of law, and to denote the influences making for it this position.

Adequate consideration of this subject demands examination of three points: when custom is law; how custom becomes law; and to what extent custom has become law.

WHEN CUSTOM IS LAW.—It is not here proposed to settle the dispute, that has long troubled jurists and legal philosophers, whether law is that which is enunciated by the state, or that which is enforced by the state as its will.[1] It is certain that all the "standards of rights, duties, privileges, liabilities and powers," [2] the observance of which is insisted upon by an authoritative agent, or force, are law; and it is likewise certain that all law is so insisted upon. In municipal law this insistence is accomplished by the courts of justice. International Law, assuming that it is law, is enforced "partly by a conscious conviction that they (its principles) are good and right; partly by those subtle influences which make it difficult for a man or body of men to act in defiance of the strongly held views of those with whom they habitually associate; partly by fear lest disregard of them should in the long run, bring evil on the recalcitrant." [3] For the purposes of this paper, it makes no dif-

1. Gray: Nature and Sources of the Law, ch. iv.
2. Prof. H. W. Ballantine.
3. Lawrence: Principles of International Law, par. 9.

ference whether enforcement is taken as the cause or effect of law, it is a reliable criterion of what is law. Hence when a custom is enforced by the courts of a state it is municipal law;[4] and by international public opinion, it is international law, be this the cause or effect of such enforcement. "Custom is the common use or practice of an individual or community, but more especially the latter; an established manner or way."[5]

How Custom Becomes Law.—Custom to become law must become a part of the standards enforced by the state, or the various forces that give international law its legal character. The sources from which standards that make up law are drawn, may be either primary or secondary.

The distinguishing characteristic of a primary source of law is that it is enforced by virtue of being a primary source. Such sources are at least two: statute and principle. Statutes are enforced as such; the fact that a rule is a statute is sufficient reason for its enforcement, for it is the formally expressed will of the state, by virtue of authority given to exercise that function within certain limits. The judiciary is an agent or part of the government of a state, and generally speaking, the result of a will expressed by statute is that a will is enforced by the courts. Theoretically these are the same rules, for the ideal judiciary is one that is infallible in the accomplishment of its purposes, at least one of which is the application of law.[6]

By "principle" is meant: the dictates of natural justice, of right and wrong, and ideas of consistency with other rules of law, convenience and public policy.[7] In the adjudication of cases one frequently arises that is covered by no legal principle. Also, in varying degrees, it is doubtful whether formerly applied rules will be found adequate for the decision of the particular case. The same is also true of statute. Hence in all cases brought before the court, it is first decided whether an adequate rule exists. In so deciding the judge draws upon principle for the basis of his decision. In the second place, if this first ques-

4. Willoughby: Nature of the State, p. 156, *et seq.*
5. Century Dictionary. Holland Jurisprudence (10 ed.) 55, 58.
6. Robinson: Elements of American Jurisprudence 283.
7. 22 Law Quarterly Review 293.

tion is decided negatively, he again draws upon principle to supply the rule. The application of principle to the facts of a case gives evidence of a doctrine of law that will be followed in future cases, which are sufficiently analogous; or that the facts of a case to which an old doctrine is applied, are sufficiently analogous to the facts of a previous one, that the doctrine there evidenced will apply to the one in question. Repeated application of the doctrine so evidenced will expand it to cover the various facts to which it is applied; and it establishes the doctrine as a precedent that grows stronger and more authoritative with each repetition. An example of this expansion of legal principles is seen in the application of the law of public service companies to railroads. Many rules of the common law relating to carriers and like services, existed before this improved means of transportation appeared. In many cases these rules were construed to apply to railroads, while in others they were decided to be inadequate. This is particularly true of the necessity of supplying adequate facilities for service, it being permitted that certain of the older services refuse it after the original facilities are exhausted, but required of more modern ones that facilities of service be increased to meet the normal increase of demands.[8]

Whether custom is a primary source of law will be discussed below.

Sources of law may also be secondary, the essential characteristic of which is that they are sources from which the primary ones are made up. They are not enforced by virtue of being such, but by virtue of entering into the primary sources. The extent to which custom enters law in this manner will be discussed below.

THE EXTENT TO WHICH CUSTOM HAS BECOME LAW.—In earlier times custom was an important, primary source of law. It is probable that it was enforced and respected the same as legislation and adjudication at the present time.[9] The impor-

8. Compare: Browne *v.* Brandt, 1 K. B. 696; Ballantine *v.* Mo. Ry. Co., 40 Mo. 491. Ayers *v.* C. & N. W. Ry. Co., 71 Wis. 372; 37 N. W. 432. See also Wyman Public Service Corporations, sec. 791.

9. Holland, *supra*, 57. Salmond, Jurisprudence, ch. viii.

tance of the family as a political unit,[10] ancestor worship,[11] the simple wants and interests of early society,[12] yet the need of some organization,[13] the fact that custom was adequate to meet this need,[13a] the lack of trained jurists in the early English courts,[14] the fact that decisions were unwritten,[15] and various other influences, operated in various combinations, and at various times, to give custom importance as a primary source of law. This importance has gradually decreased from the first, when it was exclusive, to the present, when it is negligible.

At the present time, custom is of slight importance as a primary source of law. One of the principal reasons for this decreased importance is the change that has taken place in the popular thoughts, ideas and beliefs. Ancestor worship no longer ties progressive states to the past. The family has lost its importance as a political unit, its only influence now being remote and indirect. People of this age are not generally superstitious; unbeaten paths no longer terrify; and it is only necessary to prove new ways are better that they be traversed. The age is characterized by independent thinking and individualism,[16] making the force of custom comparatively weak, and consequently detracting from its legal force.

In the second place: custom has been replaced by legislation to some extent. It may be that this legislation is to a greater or

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10. Wilson: The State Ch. I and Sec. 50; Elwood: Sociology and Modern Sociological Problems 54, 55. Myers: Ancient History 350.

11. Wilson: *supra*, sec. 29. Menzies: History of Religion, p. 30. Ross: Social Psychology 217, 219.

12. Ely: Evolution of Industrial Society 39, 87, 88. Willoughby: *supra*, 145.

13. Badgehot: Physics and Politics 24, 25. Elwood: *supra*, 43.

13a. Pollock: Maine's Ancient Law 1-20. Holland, *supra*, 53, 54. Carter: Law, Its Origin, Growth and Function 59.

14. Ogg: European Governments 3-6. Wilson: *supra*, 651-57. White: Outlines of Legal History 50. Maine: Early Law and Custom 170.

15. 9 Law Quarterly Review. Interesting cases on this point: Lattan *v.* G. W. Ry. Co., 2 E. & E. 844. Pozzi *v.* Shipton, 8 A. & E. 963. Cason's Case, 5 Vin. Abgd. 196. Moreton *v.* Parkman, 5 Vin. Abgd. 196. Redshaw *v.* Drake, 5 Vin. Abgd. 216.

16. Elwood: *supra*, 114, 323.

less extent, made up of custom, but the point now considered is to what extent custom is a primary and not a secondary source of law. From the first, legislatures have tended to become more and more active.[17] This has been due to two influences. In the first place the people have permitted it.[18] With political progress legislatures have become more representative, and realizing this, the people have willingly given them a freer hand. This in conjunction with the forces noted above that have decreased the importance of custom, have made it possible for legislatures to break old customs as time goes on. Thus in the regulation of divorce, many Roman Emporers tried in vain to legislate against the capricious dissolution of marital relations.[19] One explanation of their failure is the custom of regarding marriage as a private agreement concerning the two parties, that could be entered or dissolved at pleasure. But reference to the present, shows divorce effectively regulated by all states. It makes much less difference now than previously how long a certain action has been sanctioned by custom, that in itself is no reason why it should not be repudiated by legislation. There is no doubt that states, although restricted by certain great fundamental principles, are comparatively free to contravert customs. The people no longer insist that they be followed for the mere reason that they are customs; and they look to the actions of their legislatures as of the proper agents of establishing rules of conduct.

The same tendency is even more evident in international law. In its early history it consisted almost exclusively of custom that had been tacitly accepted by each state.[20] By repeated actions of powerful states customs would be established that were given a legal character by the various forces that impart such character to International Law. But now tacit consent is not the exclusive means of developing International Law, for with ever increasing frequency it is being substituted by express consent.[20a]

17. Salmond: Jurisprudence 67.

18. Willoughby: *supra*, 148.

19. Jas. Bryce in Select Essays on Anglo-American Law Vol. III: 782-833.

20. Lawrence: Principles of international Law (5 ed.) 43.

20a. Oppenheim: International Law, ch. i.

The great law-making treaties are products of this action, and the great international conferences at The Hague in 1899 and 1907 have applied this principle so extensively that they are spoken of as rudimentary international legislatures.[21] It is certain that these conventions are properly said to have legislated, and their product in the community of which states are members, is somewhat analogous to statute within a state. These conventions accomplished great results and in doing so repudiated many customs that had previously been followed. Thus in the days when International Law was developed by the tacit consent of nations, invading armies could without limit or measure take what belonged to the enemy. Although not often utilized in later times the right continued to exist. At these conventions, the right was repudiated by the prohibition of the destruction or seizure of private enemy property, except when absolutely necessary or when falling within one of several exceptions specified.[22]

In the second place, legislatures have willingly utilized this additional liberty, and accordingly have greatly increased their activities. The enormous output of legislation is evidence of this activity, and its ever increasing amount gives proof of its present importance. New demands are constantly arising and existing law is found inadequate and silent on many points.[23] The result is further activity on the part of legislatures to fill these unoccupied places and provide definite regulations. This results in the pre-emption of unoccupied fields for the range of custom, and the consequent preclusion of the growth of custom to satisfy new needs. Custom is of slow development and cannot be waited for when serious need arises, if this were otherwise desirable, which is doubtful. An example of this preclusion of the growth of custom by the prior activity of legislatures is seen in the law of Husband and Wife. When the American colonies became independent, they took from England, all the principles of common law not repealed by implication or specifically.[24] The marriage relation itself, i. e., the capacity of

21. Lawrence, *supra*, 47.
22. Lawrence, *supra*, 431, 434.
23. Markby: Elements of Law (6 ed.) sec. 81.
24. Essays on Anglo-American Law, *supra*.

contracting marriage, the mode of contracting it, its dissolution, etc., belonged to the ecclesiastical authorities. Hence the laws taken over by the United States were silent on these subjects. There was a great vacant space in the family law, for which there was no definite regulation. That it was found undesirable to await the growth of custom is implied by the fact that at first no general provision was made for divorce, the state legislature granting it by special act in individual cases. Consequently the states passed general acts as the most effective and suitable means of regulation.

The results of these influences are two: (1) year by year, legislation encroaches upon the space formerly occupied by custom; (2) the space which custom might have grown to fill, is pre-empted by legislation.

The judiciary is exercising a like influence on custom as a primary source of law. If custom is taken over by the court, and finally embodied into precedent, it no longer has force as custom,[25] but as precedent which the courts will usually follow.[26] The extent to which this is done is seen when it is remembered that the great common law system of England and the United States is largely made up of such customs. In addition to this the courts decide cases *de novo,* as far as custom is concerned, thus precluding any development of custom on the point so disposed of. Such *de novo* doctrines are evidenced when the court decides cases on justice, policy and what is reasonable, but when no authority can be cited for the particular holding. Cases arising to which no established doctrine is applicable are becoming more infrequent as adjudication and legislation gradually add to the number and scope of the doctrines so established, and for that reason some authorities hesitate to say that judges establish them independent of any other agency.[27] But many cases show this hesitancy to be unwarranted. In Queen *v.* Instan[28] the court held that where there is a clear moral

25. Gray, *supra,* 609-641 (secs.).

26. Dillion: The Law and Jurisprudence of England and America 231.

27. Clark: Practical Jurisprudence 244-45. Carter's interesting book, Law, Its Origin, Growth and Function, also a fine example of this.

28. 1893; 1 Q. B. 450.

obligation, it ought, even in the absence of all authority, to find a legal duty to correspond to the obligation.[29] Dalton *v.* Angas, without authority or precedent, held that where a legal principle has been clearly established, the courts will not extend them to the point of absurdity. Cases may also arise where it is obviously unjust to enforce a custom as law. This may be because it is antiquated or otherwise inadequate, but the result is always its repudiation as far as any legal effect is concerned. Thus in International Law, the old right of a belligerent state to arrest and hold as prisoners of war, the citizens or subjects of the enemy domiciled in the former, was tacitly abandoned, giving rise to the custom of allowing such citizens to depart. This was at the time of professional armies, when those trained in military affairs were not to be found in great numbers outside the state to which they owed military allegiance. With the growing ease and probability of migration of persons of this class, because they are no longer professional soldiers, publicists predict that this rule will be repudiated in favor of arresting as prisoners of war those who are most likely to enter into armed opposition to the domicile state, if allowed to return.[30] This tendency is also seen in the modification of the responsibility of the master for injuries committed by his servant. When the servant was generally a slave, the master's entire household, including servants as well as animals was considered a unit, and the master had a right to the entire benefits of their work, and was responsible for all acts of both classes alike. But since the servant has become a freeman it would be obviously unjust to hold the master liable outside the line of employment.[31] Another example may be seen in the mitigation of the position of the wife in the common law. It may be urged that some of these were judicial repudiations of legal rules rather than customs, but in either case the effect of repudiation was given, and

29. 1881; 6 App. Cas. 746. See also: Sunholv *v.* Alford (1839), 3 M. & N. 248; 49 R. R. 539. Merry *v.* Ruves (1757), 1 Eden 1. Bradford *v.* Ferrand (1902), 2 Ch. 655. Ilott *v.* Wilkes, 3 B. & Ald. 304; 22 R. R. 400. Norway Plaines Co. *v.* B. & M. Ry., L. Gray (Mass.) 263.

30. Lawrence: *supra,* 389, 390.

31. Interesting discussion in Kungan *v.* Silvers, 37 N. E. 416.

if legal rules are so repudiated, surely customs that have not acquired that character are repudiated with much less hesitancy.

Even where custom has not been taken over, repudiated, or precluded by legislation and court decision, it is not enforced as such. To be enforced by the courts, it must meet certain tests, and these are being rigidly applied as time goes on. Among other qualifications, custom must be reasonable,[32] not contrary to any positive rule of law,[33] and a matter of common knowledge.[34] The determination of whether these tests are met is for the court to decide.[35] It is only by this judicial sanction that custom as such could become law. Judges are now skilled jurists, trained in legal reasoning, and hence not as apt to follow blindly after custom as in early times above described. It is certainly the case that if a judge considers custom right, he considers it reasonable, while if it does not meet his ideas of right, justice, consistency, etc., he would be of the opposite opinion.[36] If this is true, it is evident that custom is not enforced as such, but because it coincides with principle.[37]

The fact that custom is not a primary source of law, does not mean that it is not an important element thereof. Primary sources, as seen above, are made up of various elements, secondary sources. It is evident that if custom is an important secondary source of law, it is an important element of law. The extent to which custom forms a secondary source of law

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32. 17 Am. & Eng. Encyc. of Law (2 ed.) 495, Hanston *v.* McArthur, 7 Ohio 55, part 2.

33. 29 Am. & Eng. Encyc. of Law (2 ed.) 371.

34. Note references, §§ 32, 33.

35. 12 Cyc. 1102-3. 29 Am. & Eng. Encyc. of Law (2 ed.) 415, 369. Cases collected in above references. Holland: Jurisprudence (10 ed.) 60.

36. W. Jethro Brown: 5 Col. Law Jr. 570. Current issue (5-23-1914) American Law Review, "Judicial Legislation." Gray: *supra,* 609-41; 215-232.

37. Particular customs are now entirely excluded by rigid application of the rule that such customs be of "immemorial existence," which has been legislatively declared to be antedating the reign of Richard I. See Salmond: Jurisprudence, ch. vii. Interesting collection of cases in 29 Am. & Eng. Encyc. of Law (2 ed.) 369.

may be determined by examining the primary sources and learning to what extent they draw upon custom.

Compared with the earlier history of legislatures, custom is not an important element of their present product. There was a time when the legislation of England amounted to nothing more than the affirmation of custom and the recognition thereof as laws.[38] But that was at a time when, by the nature of society, custom had a firm hold on popular will, and when legislation was secured only by almost unanimity of demands from the king. The reaffirmation of custom was the only subject upon which this unanimity of demand could be secured. It is safe to say that reform legislation seldom secures unanimous support at passage, and if there were a way of telling, it is probable that it passes by smaller majorities than any other. Legislatures of the present are "sensitive," i. e., they record the will of the state by small majorities; they are no longer seriously impeded by the necessity of securing unanimity of action, thus making it impossible to secure results on many other lines than those indicated by the popular customs. In fact the present activities of legislative bodies are more concerned with remedial statutes than any other. There is little incentive to pass statutes where their functions are performed adequately by custom. But where practices have grown up that are by their nature harmful, legislation is exercised to remedy these abuses. Thus the game laws of a state, which are always extensive, are remedies of the abuses in the slaughter of game; corporation laws are largely composed of regulations to prohibit the abuses to which these organizations have been found prone; liquor laws are aimed at intemperance, etc. These abusive practices may have been customs or not; but, at any rate, they are not incorporated into the laws, but repudiated by them. Furthermore customs generally would be inadequate to meet the needs of a progressive state. They are of past formation, sufficiently antedating the present conditions and needs to make them unsatisfactory for incorporation into law. They change but slowly, and often for that very reason must be supplanted by the more mobile method of legislation.

38. Ogg: *supra*, 6, 9. Myers: Medieval & Modern History 203.

Although seldom incorporated bodily into statutes, custom does largely enter to determine the details of their composition. Where the details of measures are being decided, there is advantage in incorporating custom to the greatest possible extent, for being custom, it is widely known, and hence will be largely followed, whether the law is known or not; it appears sensible; and is much more apt to be popular than if innovations were introduced, where custom would serve as well. The fact that an action is a custom raises the presumption that it is the most convenient. "One can hardly doubt that it originated in the conscious choice of the more convenient of two acts; though sometimes, no doubt, in the accidental adoption of one of two different alternatives." Legislators are members of society, and subject to all the influences of custom upon it. Where it is not contrary to the purpose to be accomplished by the law, it is but natural to follow them. An example of the way customs may be introduced to determine the details of a statute may be seen in the laws of many states to regulate the passage of vehicles on the highways. In the United States these laws invariably require them to pass to the right. A rule of the opposite effect would be the cause of constant trouble and inconvenience, and, except by those who knew of its provisions, it would be constantly violated. This is because an old custom dictates that passage be to the right—a custom that some trace back to the earliest times, when the implements of warfare made it advantageous for one to pass the stranger keeping him to the left, or the shielded side.[39] At any rate, the "rule of the road" has existed from time immemorial, and to contravert it would be to cause infinite trouble. It is evident that when a custom enters the law in this way, it is a matter of detail. It does not determine the policy of the law, or furnish the need of its passage, that having been furnished by the demand for a definite rule, or because the customary rule of the road was found inadequate to meet the needs it had formerly satisfied. However, in exceptional cases a custom will be adopted *in toto*. An example of this may be seen in the adoption of the Custom of Miners in the California Civil Practice Act of 1851.[40]

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39. Geo. M. Gould, M. D.: In Pol. Sci. Mo. 52-64, Vol. 72.

40. Cal. Session Laws, 1851, p. 149, sec. 621.

The adoption of custom as statute in International Law, is seen in the Declaration of London, 1909, where the old custom of allowing vessels in a blockaded port a certain period after the blockade was instituted, to depart, was incorporated into written rules to govern future operations of this kind.[41] Such adoption of custom is perhaps more frequent in International Law, than in Municipal Law, because the community in which the former operates is less homogeneous, not as well organized, and there is not the "sensitiveness" necessary to the output of a large amount of remedial statute. In fact, "International Legislature" presents many similarities to early municipal legislatures as regards the passage of laws.

Although custom is not enforced as such, it is undoubtedly followed to a great extent by judges in the adjudication of cases. As in the case of the legislature, customs are followed by the judiciary, not because they are customs, but for the same reason that they have grown to be customs. The judge, like other men, is subject to all the favorable prejudices regarding the customs of society, but often better guarded. A rule that has the sanction of custom is presumed to deserve the sanction of law, for custom is the expression of the will of society, that has been carefully tested by time. It is expected that custom will be followed by the courts, and the layman readily follows it. To contravene rules that have been extensively followed is to cause hardship, confusion and inconvenience. Thus in states where statute does not lay down the rule of the road, courts have enforced the regulation that passing vehicles turn to the right.[42] But it can hardly be said that these decisions are based upon a law that vehicles pass to the right; the courts could as well refuse to enforce it, or enforce a rule to the left, which would be impossible if it had been a law previously. But choosing to save trouble and confusion in the use of the highways, they will that the custom be followed, though this is not because of any legal standing of the custom as such. The extent to which this has been done may be appreciated when it is remembered that the great common law system of England and the

41. Lawrence: *supra,* 687.

42. Lee *v.* Foley, 37 So. 594. Neal *v.* Randall, 63 L. R. A. 668.

United States is largely composed of customs that have been followed at first by the shire and hundred moots, and later by the modern courts. In the same way customs are entering into judicial decisions each day, either consciously or unconsciously but always because they coincide with principle.

The above is also true when applied to interpretation of statutes by the courts. Legislation is the attempt on the part of the state to lay down general rules for the government of circumstances to arise in the future. These rules need application, and their statement is invariably ambiguous, making interpretation necessary. In this interpretation the court draws largely upon the common customs and usages that will apply to the statute in question. They do this because they are subject to the sway of custom, and because they realize the legislatures are so subject. It is the purpose of courts to apply *the* rule expressed by the legislature, and not *a* rule that can be derived from their expressions. Therefore, it is generally necessary to take the customary and common uses of such words. Examples of this may be seen in the interpretation of "negligent," in which the standard is the customary action of the usual prudent man under similar circumstances. Many other terms, phrases, and statements are interpreted in the same manner, such as "sufficient cause," "maliciously"—and other states of mind,—"reasonable"—and other words referring to what must be a matter of opinion.

Hence it may be said the custom is not a primary source of law. But that in no way means that it is not an important element of law. Custom, by entering law through legislation and principle becomes an important element thereof, and a large element of the rules that determine daily conduct.

L. Dee Mallonee, in the *American Law Review.*